Supreme Court, U. S.
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IN THE

UNITED STATES SUPREME COURT

RAYMOND L. SCHARF,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

NO. 76-1611

PETITION FOR WRIT OF CERTIORARI

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IN THE

UNITED STATES SUPREME COURT

RAYMOND L. SCHARF,

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UNITED STATES OF AMERICA,

Respondent.

NO.

PETITION FOR WRIT OF CERTIORARI

Now comes Petitioner, RAYMOND L. SCHARF, by Counsel to respectfully petition this Court for Certiorari.

OPINION BELOW

On March 30, 1977, the Court of Appeals for the Eighth Circuit issued its opinion in this case, CR77-1055.

A copy of that decision is affixed as Appendix, Part E.

JURISDICTIONAL STATEMENT

On April 19, 1977, the United States Court of Appeals for the Eighth Circuit denied petition for rehearing or hearing En Banc in this matter. On May 2, 1977, that Court denied a motion for stay and remanded to the United States District Court for the Eastern District of Missouri for evidentiary hearing. Copies of these Orders are affixed as Appendix Part F, G, and H.

Review of the denial of petitioner's request to plead anew and the order requiring evidentiary hearing is sought herein pursuant to 18, United States Code, § 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Does the Court of Appeals for the Eighth Circuit have the power to take for itself the rulemaking power of the Supreme Court and the Congress of the United States

by creating a hearing to supplement a record adjudged violative of Rule 11, Federal Rules of Criminal Procedure, in direct contravention to Rules previously made by this Court and Congress and, further, to delegate such power to a United States District Court?

2. When the Supreme Court and the Congress expanded Rule 11, Federal Rules of Criminal Procedure, by incorporating prior case law therein, did the Congress and the United States Supreme Court thereby free Trial Courts from the necessity of strict compliance with Rule 11, and the requirements of the prior case law?

3. May a challenged plea of guilty stand, absent an affirmative showing in the record of substantial compliance with each and every relevant subsection of Rule 11, Federal Rules of Criminal Procedure?

4. May a record deemed insufficient

under Rule 11, Federal Rules of Criminal Procedure, be remanded for Ad hoc evidentiary hearing?

5. May a Court of Appeals remand a criminal case for hearing not presently existing in law without specification of standards to govern such hearing?

RULES INVOLVED

Rule 11 and Rule 32 (d) of the Federal Rules of Criminal Procedure are involved in this case. The full text of these Rules is set forth as Appendix, Part I.

STATEMENT OF THE CASE

On September 20, 1976, defendant Raymond L. Scharf, entered a plea of guilty to one count of a seven count indictment alleging a violation of 18 U.S.C. § 1951. The Government, at that time, sought dismissal of the indictment's remaining six counts. At that

time the Government informed the Court that it sought such dismissals "in the interest of justice". (See Appendix Part A.) Subsequently the parties filed Affidavits showing that the request for dismissals constituted compliance in part with a plea bargain negotiated by the attorneys for the parties. (See Appendix J and K). Defendant contends that that agreement has never been honored by the Government.

Defendant was convicted pursuant to the arraignment and plea bargain. On the 22nd day of October, 1976, he was sentenced to ten years imprisonment. (See Appendix Part B).

Defendant, in timely fashion brought a motion pursuant to Rule 32 (d), Federal Rules of Criminal Procedure, requesting leave to withdraw the plea, contending that the Trial Court failed to ascertain on the record whether or not the defendant understood:

(a) The nature of the charge against him;

(b) That the sworn statement taken at the hearing could be used against the defendant in a prosecution for false statement;

(c) That he had a right to persist in his plea of not guilty;

(d) That he had the right to cross-examine witnesses against him;

(e) That he could not be compelled to incriminate himself;

(f) That upon his plea of guilty there would be no further trial and that his plea constituted a waiver of trial;

(g) That if he were to plead guilty, the Court could ask him questions about the offense;

Further, it was shown that the Trial Court had not elicited a factual basis for the plea which violated Rule 11 (f), Federal Rules of Criminal Procedure. In addition, the motion demonstrated non-compliance with Rule 11 (d) and 11 (e) of the Federal Rules of Criminal Procedure. Moreoever, defendant contended that the Government's failure to honor the

plea bargain violated the doctrines of SantoBello v. New York, 404 U.S. 257, 30 L. Ed. 2d. 427 (1971) (See Appendix Part C).

The motion was denied by the Trial Court. (See Appendix Part D.). Appeal was duly taken to the Court of Appeals for the Eighth Circuit. On March 30, 1977, that Court issued the opinion herein which:

(1) Found that the Trial Court had made "adequate" compliance with Rule 11 (c) and Rule 11 (f), Federal Rules of Criminal Procedure;

(2) Found that Rule 11 (d) and 11 (e), Federal Rules of Criminal Procedure had been violated by the Trial Court; and

(3) Ordered the case remanded to the Trial Court to hold an evidentiary hearing and determine;

(a) the terms of the plea bargain;

(b) whether the bargain was breached; and

(c) whether manifest injustice would result from allowing the conviction to stand. (See Appendix Part E).

Motion for re-hearing and Petition for Hearing En Banc was filed and denied. (See Appendix Part F.). Motion for Stay of Mandate Pursuant to Rule 41, Federal Rules of Appellate Procedure, was filed and denied. Mandate issued under date of May 2, 1977. (See Appendix Part G.).

ARGUMENT

IMPORTANCE OF THE ISSUES PRESENTED

I. THE COURT SHOULD TAKE JURISDICTION OF THE CASE HEREIN BECAUSE OF THE IMPORTANCE OF THE QUESTIONS POSED TO THE ORDERLY ADMINISTRATION OF CRIMINAL JUSTICE.

From a "systems" standpoint, the most important single phase in the administration of criminal justice is adjudication of guilt pursuant to a plea of guilty or Nolo Contendere. If such determinations are inadequate the system fails in its function to maintain order through the belief of the average citizen in the fundamental credibility and fairness of the criminal law. If the use of such procedure is reduced, the system is crushed by the huge volume of contested litigation fed into the process.

The process of adjudication of guilt presently requires the creation of a record

of proceedings which sets forth the minimum quantum of knowledge possessed by the Trial Court immediately prior to the finding of guilt. The Court's action is not automatic. Rather it is based upon an exercise in judgment as to the acceptability of the plea, the plea bargain, if any, and the defendant's ability to participate in the system free from debilitating physical and mental handicaps with sufficient knowledge and mental capacity to make the decisions essential to a knowing and voluntary plea. The Trial Court must also examine the efficacy of the Government's activities prior to the offering of the plea. That determination is especially sensitive, where there is a direct causal relationship between governmental conduct and the plea. In the last decade, guilty pleas have been regulated by Rule 11; Federal Rules of Criminal Procedure, McCarthy v. United States, 394 U.S. 459, 22 L. Ed. 2d 418 (1969), and

Boykin v. Alabama, 395 U.S. 238, 23 L. Ed. 2d. 274 (1969). Rule 11 was modified in 1975 by its expansion to include those requirements previously contained in McCarthy (supra) and Boykin (supra), and a section requiring the Trial Court to regulate and evaluate plea bargaining pursuant to the precepts of SantoBello v. New York, 404 U.S. 257, 30 L. Ed. 2d. 427 (1971).

The Government now argues in some courts that, by the expansion of Rule 11, this Court and the Congress of the United States down grades the requirements of prior case law to mere option. This argument was rejected in the Second Circuit, United States v. Journet, 544 F. 2d. 633 (C.A. 2nd, 1976); partially accepted in the District of Columbia Circuit, United States v. Watson, 548 F. 2d. 1058 (1977); and accepted in full by the Eighth Circuit in the instant case.

At this juncture, it is fair to say that Rule 11, Federal Rules of Criminal Procedure, the keystone to the criminal justice system, is eroding and for 80% of the criminal case workload of America's Federal judiciary referred to in Halliday v. United States, 394 U.S 831, 23 L.Ed 2d. 16, (1969), the finality of guilt adjudication rests more upon the geographical site of the taking of the plea than the record of proceedings, or the substantive conduct of the Court and parties.

II. THIS COURT SHOULD TAKE JURISDICTION PURSUANT TO THE REASONS SET FORTH IN RULE 19, RULES OF THE UNITED STATES SUPREME COURT, IN THAT A COURT OF APPEALS HAD DECIDED A FEDERAL QUESTION IN CONFLICT WITH DECISIONS OF THE SUPREME COURT OF THE UNITED STATES.

In 1969, this Court specifically held;

> "We hold that a defendant is entitled to plead anew if a United States District Court accepts his guilty plea without fully adhering to the procedures provided for in Rule 11." McCarthy v.

United States, 22 L. Ed. 2d, 425. (emphasis added).

In 1977, the Eighth Circuit held in the case at bar:

> "It is unfortunate that the District Court did not comply more fully than it did with Rule 11 (d) and (e). It is settled in this Circuit, however, that not every failure of a District Court to comply with the Rule entails the setting aside of a conviction with leave to withdraw a plea of guilty..." In the instant case, Slip Opinion p. 12, Appendix, Part E. (emphasis added).

This Court has held:

> "Rule 11 is designed to eliminate any need to resort to a later fact finding proceeding. McCarthy v. United States, 22 L. Ed. 2d. 427."

The Eighth Circuit remanded however for the following purpose (To):

> "hold an evidentiary hearing to determine what the terms of the plea bargain were and whether the bargain was breached and whether manifest injustice will result if the conviction based on the guilty plea is permitted to stand...." Slip Opinion pp. 13, 14, Appendix E.

III. THIS COURT SHOULD TAKE JURISDICTION PURSUANT TO THE REASONS SET FORTH IN RULE 19, RULES OF THE UNITED STATES SUPREME COURT, IN THAT A COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS.

At present, seven circuits adhere to McCarthy, (supra) and its strict interpretation of Rule 11, Federal Rules of Criminal Procedure, while four Circuits either follow a different doctrine or equivocate in their application of McCarthy (supra). The following chart shows that distribution.

Those Circuits which adhere to the application of McCarthy, (supra)

1. FIRST CIRCUIT:

   United States v. Yazbeck
   524 F. 2d 641 (1975)

2. SECOND CIRCUIT:

   United States v. Journet
   544 F. 2d 633 (1976)

3. THIRD CIRCUIT:

   United States v. Crusco
   536 F. 2d 21 (1976)

United States v. Cantor
469 F. 2d 435 (1972)

4. FOURTH CIRCUIT

United States v. Boone
543 F. 2d 1090 (1976)

5. FIFTH CIRCUIT:

United States v. Narisi
538 F. 2d 1213 (1976)
United States v. Price
538 F 2d 722 (1976)

6. SIXTH CIRCUIT:

Phillips v. United States
519 F. 2d 483 (1975)
United States v. Wolak
510 F. 2d 164 (1975)

7. NINTH CIRCUIT:

United States v. Harris
534 F. 2d. 141 (1976)

Those Circuits which reject or are waivering in the application of McCarthy (supra).

1. EIGHTH CIRCUIT:

The instant case.

2. DISTRICT OF COLUMBIA CIRCUIT:

United States v. Watson
548 F. 2d 1058 (1977)

3. SEVENTH CIRCUIT:

Gates v. United States
515 F. 2d 73 (1975)

4. TENTH CIRCUIT:

United States v. Davis
544 F. 2d 1056 (1976)

WHEREFORE, it is respectfully requested that this Court issue its writ of CERTIORARI herein.

Respectfully submitted,

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Respondent

NO. 76-1611

APPENDIX TO PETITION FOR CERTIORARI
SUBMITTED PURSUANT TO RULE 23 (f) AND
(i) SUPREME COURT RULES

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(PART A, 1)

. . CAPTION . .

TRANSCRIPT OF GUILTY PLEA

The following proceedings were had on the date set forth herein before the HON. H. KENNETH WANGELIN, United States District Judge, presiding in Court No. 3 of the Eastern Division of the Eastern District of Missouri, United States Court House & Customs House, 1114 Market Street, St. Louis, Missouri, with the defendant present in person.

A P P E A R A N C E S:

Mr. Richard Billeaud, Special Attorney, U.S. Department of Justice, Organized Crime Strike Force, for the Government; Mr. Norman London, for the defendant.

. . CERTIFICATE. .

(PART A, 2)

THE COURT: 76-141 CR (3), United States of America versus Raymond L. Scharf.

MR. BILLEAUD: Your Honor, this case is set for trial this morning. However, I understand that Mr. London, Mr. Scharf's attorney, may have an announcement to the Court relative to a possible plea.

THE COURT: Let the record show that the defendant is here before the Court together with his counsel, Mr. Norman London, and Mr. Billeaud's here for the United States.

What do you say, Mr. London?

MR. LONDON: Court please, defendant has advised me of his desire to change his plea from not guilty to guilty with respect to Count 3 of the Indictment.

THE COURT: Have the defendant sworn.

(The defendant was placed under oath by the Clerk of the Court.)

THE COURT: In the event plea is made to Count 3 and is accepted by the Court, what's the Government's position as to the other six counts in this Indictment?

MR. BILLEAUD: Those counts, we would request the Court dismiss, Your Honor.

THE COURT: For what reason?

MR. BILLEAUD: In the interest of justice.

THE COURT: Total of seven counts, is that right?

MR. BILLEAUD: That's correct, Your Honor.

THE COURT: Before we proceed further, Mr. Scharf, the reason I had you sworn is to let you know that even though the Government may move the Court to dismiss the other counts; namely, 1, 2, 4, 5, 6 and 7, that the final analysis on wither (sic) or not they are dismissed and the

final judgment on that matter is up to this Court, you understand that, sir?

THE DEFENDANT: Yes, Your Honor.

THE COURT: I would advise you further at this time, and I'm not trying to get you to change your plea or not change your plea but I will advise you at this time that in event I refuse to allow the dismissal of the other counts, I will allow you to withdraw any plea you make here today, you understand that, sir?

THE DEFENDANT: Yes, Your Honor.

THE COURT: In view of the fact that I must elicit certain information from you concerning the counts involved, you are further advised that any statement you make today concerning this matter cannot be used against you in a trial of this matter except for perjury. In other words, if you should lie to me here today, that

would be perjury and/or it might be perjury and you might be prosecuted for that, but other than that the statement you make here today cannot be used against you in connection with the trial for this particular count. Do you understand that sir?

THE DEFENDANT: Yes sir.

THE COURT: You have received a copy of the Indictment have you?

THE DEFENDANT: Yes, sir.

THE COURT: How do you feel physically today, sir?

THE DEFENDANT: Pretty good.

THE COURT: Is there any question in your mind as to his physical and mental condition, Mr. London?

MR. LONDON: No, Your Honor.

THE COURT: Are you ready to plead?

THE DEFENDANT: Yes, sir.

THE COURT: What is your plea as to Count 3?

THE DEFENDANT: Guilty.

THE COURT: Is there any question, Mr. London, that your client is acting voluntarily?

MR. LONDON: No, sir.

THE COURT: Does he understand his right to trial?

MR. LONDON: He does, Your Honor.

THE COURT: Case is set for trial today, Mr. Scharf, I have a jury waiting. I would advise you at this time that I cannot accept your plea unless under the facts and the law it indicates guilt, and, further, that you understand your rights.

You have a right to trial by a jury, the verdict of the jury must be unanimous. The Government would have to confront you

with the witnesses upon whose testimony it relies to obtain a conviction. You will be presumed to be innocent until proven guilty beyond a reasonable doubt. You can call your own witnesses. You have the right to compulsory process.

I'm sure Mr. London, who is a learned trial counsel, has advised you of your rights to trial, is that correct, sir?

THE DEFENDANT: He has, sir.

THE COURT: Do you further understand that if the Court accepts the plea of guilty as to Count 3 that the punishment can range up to a maximum of a fine of not more than $10,000. or twenty years imprisonment or both, do you understand that, sir?

THE DEFENDANT: Yes, sir.

THE COURT: Have any threats or

promises been made to get you to plea guilty?

THE DEFENDANT: None whatsoever.

THE COURT: Do you believe there is any understanding or any prediction as to what sentence you would receive?

THE DEFENDANT: No, sir.

THE COURT: Count 3 charges that on or about the 1st day of August of '73 and continuing thereafter until about the 15th day of August of '73 that here in the City of St. Louis you and a person named Bonnie Morley, who is named as a co-conspirator but not as a defendant, and each with the other, to obstruct, delay, and affect commerce.

Now, I understand the business you are in is that of operating vending machines, is that correct, sir?

THE DEFENDANT: That is correct.

THE COURT: Are those shipped to you from outside the State of Missouri?

THE DEFENDANT: Some are, sir.

THE COURT: I also understand that these vending machines in a considerable part involve the vending of cigarettes, is that correct?

THE DEFENDANT: That is correct.

THE COURT: And are these cigarettes received by you from out of the State of Missouri?

THE DEFENDANT: Yes, sir.

THE COURT: In other words, you know that both as to some of the vending machines and as to the cigarettes, that they are in interstate commerce immediately prior to being received by you, is that right, sir?

THE DEFENDANT: That is correct.

THE COURT: Now, what was the name of

your business?

THE DEFENDANT: Ray Scharf Coin Machines Incorporated.

THE COURT: And who operates the Cigarette Vending Machine Company Incorporated?

THE DEFENDANT: Fellow by the name of Hofstetter, Mr. Hofstetter.

THE COURT: You and he were in competition?

THE DEFENDANT: Yes, sir.

THE COURT: I'll ask you if you or to your knowledge and consent -- well, let me ask you if you at any time during this period of time from August the 1st of '73 to August the 15th threatened Mr. Hofstetter you say his name is?

MR. BILLEAUD: That's correct, Your Honor.

THE COURT: Hofstetter, ever threatened him with force and violence and threatened him unless and until he would cease to compete freely with you? In other words, did you threaten him to get him to either get out of business or cease competition, that's the question?

THE DEFENDANT: This other person and I did, yes, sir.

THE COURT: And you're speaking -- by the "other person" you're talking about Bonnie Morley?

THE DEFENDANT: Yes, sir.

THE COURT: You were aware of her activity in the matter?

THE DEFENDANT: Yes, sir.

THE COURT: And you consented to it?

THE DEFENDANT: Yes, sir.

THE COURT: Any additional questions from the Government?

MR. BILLEAUD: No, Your Honor.

THE COURT: Mr. London, do you know of any reason why your client should not plead guilty?

MR. LONDON: No, sir.

THE COURT: You have discussed this matter with him at some length I take it?

MR. LONDON: At great length, Your Honor.

THE COURT: And you have discussed with him the elements of the allegations of Count 3, is that right, sir?

MR. LONDON: I have, sir.

THE COURT: Let the record show that the plea is accepted; I find it is knowledgeable, voluntary and has a basis in fact, it contains all the elements of the crime and is therefore, accepted.

I want a pre-sentence report. Sentencing will be on October the 15th. The

pre-sentence report will be available on the Thursday prior to that time, and is the defendant on bond?

MR. LONDON: He is, Your Honor.

THE COURT: He may continue on his present bond.

MR. LONDON: The Court please, I believe, for the record, Mr. Billeaud has an announcement with regard to the restraining order issued by this Court in pursuance to Count 1 of this Indictment.

MR. BILLEAUD: Yes, Your Honor, this Court signed a restraining order on the day of the Indictment, May 27th, restraining Mr. Scharf from disposing of any of the assets of the corporation. That was pursuant to Count 1 of the Indictment. As the Government explained, we would request, at the time of sentencing, that that count be dismissed. I would request

at this time that the restraining order be lifted as to Mr. Scharf.

THE COURT: Will you need a memorandum?

MR. LONDON: I think at the time of sentencing we will have one, but I think the record can just show you're dissolving the restraining order at this time, Your Honor.

THE COURT: Let the record show that under date of 27 May 1976 filed the same day, the Court ordered the restraining order prayed for and the motion is granted, that order is set aside at this time.

MR. LONDON: Thank you, Your Honor.

MR. BILLEAUD: Thank you, Your Honor.

* * * * * * * * * *

(P. T B, 1)

. . CAPTION. .

TRANSCRIPT OF SENTENCING

The following proceedings were had on the date set forth herein before the HON H. KENNETH WANGELIN, Unied States District Judge, presiding in Court No. 3 of the Eastern Division of the Eastern District of Missouri, United States Court House & Customs House, 1114 Market Street, St. Louis, Missouri, with the defendant present in person.

A P P E A R A N C E S:

Mr. Richard Billeaud, Special Attorney, U.S. Department of Justice, Organized Crime Strike Force, for the Government;
Mr. Norman London, for the defendant.

. . CERTIFICATE. .

(PART B, 2)

THE COURT: 76-141 CR (3), United States of America versus Raymond L. Scharf.

Let the record show that Mr. Scharf together with his counsel, Mr. London, are before the Court. Mr. London, is there any reason why sentence should not be imposed at this time?

MR. LONDON: No legal reason, Your Honor.

THE COURT: Mr. Scharf, is there any reason why sentence should not be imposed at this time?

THE DEFENDANT: No, sir.

THE COURT: Do you have anything to say in your client's behalf or do you wish to present any information in mitigation of punishment, Mr. London?

MR. LONDON: A few very brief remarks if I may, Your Honor. I have been furnished with a copy of the pre-sentence report

which I have examined and it goes into Mr. Scharf's backround, business, et cetera. I would just highlight to the Court that Mr. Scharf is married for some twenty two years now, is a father of three children, has been in business in his present business for many years, seventeen, eighteen years.

Unfortunate thing is that Mr. Scharf's business is a business that has received much adverse publicity, being the vending machine business, but it is a legitimate business. There are vending machines in every public building that I know of; schools, hospitals, churches, what have you. It's unfortunate this stigma has attached itself to this particular enterprise.

I would point out to the Court that the Government came to Mr. Scharf with an

indication that they believed that one of their witnesses was going to try to extort money from Mr. Scharf in return for not testifying and asked Mr. Scharf's cooperation. Mr. Scharf did cooperate and allowed the Government to install a telephone listening device to overhear that conversation, in which, in fact, an attempt to extort money from Mr. Scharf in return for that witness not testifying was made.

I note in the pre-sentence report that the Government explains this by saying that they feel that Mr. Scharf instigated the situation and that this was merely a final act, but I submit to the Court that if Mr. Scharf were the culprit, that he would not be cooperating with the Government and allowing them to attach a listening device when he didn't

know in fact what was going to be said in that conversation unless he felt that he was in fact being victimized.

Your Honor, I feel that because of Mr. Scharf's backround, that he should be considered by this Court for probation. If this Court should feel that in view of the nature of the offense to which Mr. Scharf has pleaded guilty that probation is not appropriate, I would move that the Court consider a sentence light enough so that at the conclusion of Mr. Scharf's incarceration that his family and his business will not have been irreparably damaged.

THE COURT: Mr. Scharf, do you have anything to say in your own behalf or do you wish to present any information in mitigation of punishment?

THE DEFENDANT: No, sir, I don't have

anything to say.

THE COURT: Raymond L. Scharf, it is adjudged that on your conviction as a result of your plea of guilty to Count 3 of the Indictment, that you be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ten years or until otherwise discharged by due process of law; it being further ordered that this sentence will run concurrent with -- and I don't believe I have the number of that case in Judge Regan's room.

MR. BILLEAUD: Your Honor, that is 76-166 CR (2).

THE COURT: Run concurrent with whatever sentence is imposed by Judge Regan in that case.

It is further ordered and adjudged because of the extent of the business

operation -- and by this I'm not condoning what you plead guilty to, but in view of what I have in my pre-sentence report as to the nature and extent of the property involved, that your surrender shall be delayed for a period of ninety days and that you will report to the Marshal, United States Marshal, Mr. Link, here in this building -- well, Monday, the 19th day of January.

You may continue on your present bond during that period of time, with this caution: you understand that that bond can be revoked at any time by the Court on proper showing?

THE DEFENDANT: Yes.

THE COURT: Be very careful.

MR. BILLEAUD: Thank you, Your Honor.

* * * * * * * * * *

. . CAPTION . .

MOTION TO SET ASIDE JUDGMENT AND VACATE PLEA

Now comes the defendant, Raymond L. Scharf, by his duly authorized attorneys, Schwartz, Weber & Tofte, by Jay Schwartz, to respectfully move this honorable Court to set aside the judgment of conviction and permit the defendant to withdraw his plea of guilty in that the proceedings held on October 22, 1976, at which time the plea of guilty was accepted, did not comply with Rule 11, Federal Rules of Criminal Procedure, and other laws, in that:

1. The Court did not ascertain whether or not the defendant understood the nature of the charge, but merely asked whether defendant has received a copy of

the indictment, as required by Rule 11 (c)(1), Federal Rules of Criminal Procedure.

2. The Court did not inform the defendant of the fact that the sworn statement taken at the hearing could be used against him in a prosecution for false statement, nor whether the defendant so understood, as required by Rule 11 (c)(5), Federal Rules of Criminal Procedure.

3. The Court did not personally advise the defendant of his right to plead not guilty or persist in that plea if it has already been made, nor whether the defendant so understood, as required by Rule 11(c)(3), Federal Rules of Criminal Procedure.

4. The Court did not personally advise the defendant of his right to cross examine witnesses against him nor whether

he so understood, as required by Rule 11(c)(3), Federal Rules of Criminal Procedure.

5. The Court did not personally advise the defendant of his right not to be compelled to incriminate himself, nor whether he so understood, as required by Rule 11(c)(3), Federal Rules of Criminal Procedure.

6. The Court did not personally advise the defendant that if he plead guilty there would be no further trial of any kind, so that a guilty plea would constitute a waiver of trial, nor whether he so understood, as required by Rule 11 (c)(4), Federal Rules of Criminal Procedure.

7. The Court did not advise the defendant personally that if he plead guilty the Court may ask him questions

about the offense, nor whether he so understood, as required by Rule 11(c)(5), Federal Rules of Criminal Procedure.

8. In the absence of good cause shown, notification was not made to the Court of the existance of a plea agreement as required by Rule 11(e)(5), Federal Rules of Criminal Procedure.

9. The Court neither accepted or rejected the plea agreement as required by Rule 11(e)(3) and (4), Federal Rules of Criminal Procedure.

10. The Court did not require disclosure of the plea agreement in open court as required by Rule 11(e)(2), Federal Rules of Criminal Procedure.

11. The Court did not elicit a factual basis for the plea, in that it was not shown that the alleged victim's business was in interstate commerce, nor

was the alleged act in furtherance of "racketeering".

12. The Government did not honor the plea bargain as required by SantoBello v. New York, 404 U.S. 257 (1971).

13. The Court did not personally ask the defendant whether the defendant's willingness to plead guilty resulted from prior discussion between the attorney for the government and the defendant's attorney, as required by Rule 11(d), Federal Rules of Criminal Procedure.

This motion is supported by the record of proceedings, maintained by the Court, pursuant to Rule 11(g), Federal Rules of Criminal Procedure, the affidavit of the prosecuting attorney, filed in response to the motion to effectuate plea bargain presently under appeal by way of collateral attack to the United States Court of

(PART C, 3)

Appeals for the 8th Judicial Circuit (Case No. 76-2079), and of which this Court is asked to take judicial notice, and the affidavit and cases affixed hereto.

Dated this 21st day of December, 1976.

Respectfully submitted,

SCHWARTZ, WEBER & TOFTE
Attorneys for Defendant

By: /s/
Jay Schwartz

An Evidentiary Hearing is requested as to Paragraph #12.

(PART D, 1)

. . CAPTION. .

MEMORANDUM AND ORDER

OF THE DISTRICT COURT

This matter is before the Court upon defendant's motion to withdraw his plea of guilty and set aside the judgment of conviction. After careful consideration of the entire record, including the transcript of defendant's guilty plea, the Court concludes that defendant's motion must be denied.

The requirements of Federal Rule of Criminal Procedure No. 11 were satisfied and defendant demonstrated a complete understanding of the proceedings and his actions. The government dismissed the remaining counts of the indictment and refrained from seizing defendant's business under the conviction on the

remaining count. Finally, defendant has made no showing of "manifest injustice" that would require the withdrawal of his plea. See F.R.Cr.P. 32(d). Therefore,

IT IS HEREBY ORDERED that defendant's motion to withdraw his plea of guilty and set aside the judgment of conviction be and is DENIED.

Dated this 12th day of January, 1977.

/s/
H. Kenneth Wangelin
United States District Judge

* * * * * * * * * *

. . .CAPTION . . .

DECISION

Submitted: March 18, 1977

Filed: March 30, 1977

Before LAY, WEBSTER and HENLEY, Circuit Judges.

HENLEY, Circuit Judge

Raymond L. Scharf, hereinafter called defendant, appeals from an order of the United States District Court for the Eastern District of Missouri[1] denying without an evidentiary hearing a post-sentence motion for relief from a judgment of conviction following the defendant's plea of guilty to a charge of having conspired with one Bonnie Morley to violate 18 U.S.C. §§ 1951, commonly referred to as the Hobbs Act. The

[1]The Honorable H. Kenneth Wangelin, United States District Judge.

motion was filed pursuant to Fed. R. Crim. P. 32 (d) which provides in part that where a sentence has been imposed following a plea of guilty, the court may for the purpose of correcting "manifest injustice: set aside the conviction and permit the defendant to withdraw his plea of guilty.

The indictment returned against the defendant in May, 1976 contained seven counts charging violations of Title IX of the Organized Crime Control Act of 1970, 18 U.S.C. SS 1961 et seq., and of the Hobbs Anti-Extortion Act, 18 U.S.C. § 1951, obstruction of justice, 18 U.S.C. § 1503, possession of an unregistered firearm in violation of 26 U.S.C. § 5861 (d), unlawful carrying and use of an exposive in violation of 18 U.S.C. § 844 (h), and unlawful use of an explosive in violation of 18 U.S.C. § 844 (i).

Defendant, who was represented by capable counsel of his own choice, originally entered a plea of not guilty to all seven counts of the indictment. However, as a result of a plea bargain struck between defendant's attorney, Mr. Norman London of St. Louis, and Department of Justice Special Attorney Richard D. Billeaud, the member of the St. Louis "strike force" who was handling the case for the government, the defendant by leave of court withdrew his plea of not guilty to Count 3 of the indictment and pleaded guilty to that count.

The plea was entered on September 20, 1976, and on October 22, 1976 Judge Wangelin sentenced the defendant to imprisonment for a term of ten years. Thereafter, Counts 1, 2, 4, 5, 6 and 7 of the indictment were dismissed by the government in accordance with the plea bargain that has been mentioned.

In his motion to set aside his conviction on Count 3 and for leave to withdraw his plea of guilty, which motion was supported by defendant's affidavit, the defendant alleged that the district court had failed to comply in numerous respects with Fed. R. Crim. P. 11, as amended in 1975[2], when that court permitted the defendant to withdraw his plea of not guilty to Count 3 and accepted his plea of guilty to that count; and defendant also alleged that the plea bargain between his attorney and government counsel had been breached in a material respect to be mentioned.

With respect to his claim of breach of plea bargain defendant requested an evidentiary hearing. That request was not

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[2]See the Federal Rules of Criminal Procedure Amendments Act of 1975, P.L. 94-64, 89 Stat. 370.

granted, and the district court made no specific finding with respect to the defendant's claim of breach. The district court concluded that it had complied adequately with Rule 11, and that no manifest injustice would result from denial of defendant's motion.

The transcript of the proceedings that took place on September 20, 1976 reflects that in most respects the district court complied adequately with Rule 11. However, it failed to comply as fully as it might have with the portions of the Rule relating to the procedure to be followed where a plea of guilty is entered pursuant to a plea bargain. Specifically, we find that the district court failed to comply with the last sentence of Rule 11 (d) and with certain requirements of Rule 11 (3) which is entitled "Plea Agreement Procedure."[3]

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[3]Rule 11(e) has six subdivisions. The first

And we have concluded that the order of the district court denying defendant's Rule 32 (d) motion must be reversed and the case remanded for further proceedings. We do not reach the question of whether the plea bargain between the government and defense counsel was in fact breached.[4]

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five of them became effective on December 1, 1975: the sixth, which is not involved in this case, went into effect on August 1,1975. P.L. 94-64, § 2.

[4] There is no question that a breach of a plea bargain by the government, if established, may entitle a defendant who has pleaded guilty in reliance on the bargain to appropriate relief. Santobello v. New York 404 U.S. 257 (1971); United States v. Minnesota Mining & Mfg. Co., ___F.2d___(8th Cir. No. 76-1730, March 3, 1977).

Controlling facts in the case may be summarized as follows:

The defendant is a St. Louis business man who for a number of years has been engaged in the vending and pinball machine business. The vending machines dispense such items as cigarettes and candy. The machines are located in various retail establishments in and around St. Louis. The pinball machines can be used for gambling in violation of Missouri law.

The first count of the indictment charged that from about 1972 down to the date of the return of the indictment in May, 1976, the defendant had engaged in racketeering activities which subjected him to punishment under 18 U.S.C. § 1962. Had the defendant been convicted on Count 1, he would have been subject to a fine of not more than $25,000.00 or to imprisonment for not more than twenty years, or both, and, in addition,

under the provisions of 18 U.S.C. § 1963 (a) and (c) defendant's business property would have been subject to forfeiture at the instance of the Department of Justice. And when the indictment was returned, the district court entered an order restraining the defendant from disposing of his assets; the entry of that order was authorized by 18 U.S.C. § 1963 (b)

The second and third counts set out the alleged Hobbs Act violations[5] and involved the conduct of the defendant in

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[5]18 U.S.C. § 1951 (a) is as follows:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

relation to a business competitor, Cigarette Vending Machine Co., Inc., the stock in which was owned by John Hofstetter.

The second count charged that on or about August 10, 1973 the defendant planted a bomb under an automobile belonging to Cigarette Vending Machine Co., Inc., while the vehicle was parked in front of Hofstetter's home, and detonated the bomb for the purpose of so frightening Hofstetter that he would go out of business. The third count charged that between about August 1 and August 15, 1973 the defendant and an unindicted co-conspirator, Bonnie Morley, conspired to

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Section 1951 (b)(2) defines "extortion" as being the obtaining of property from another with his consent induced by wrongful use of force or threatened force, violence, or fear, or under color of official right. It was the theory of the government that Hofstetter's right to compete with the defendant lawfully in interstate commerce constituted "property" within the meaning of the statute.

practice extortion upon defendant's competitor above identified.

A conviction of the defendant on either the second or the third count would have entailed a maximum punishment of a fine of not more than $10,000.00 or imprisonment for not more than twenty years, or both. It should be observed that § 1951 does not contain a criminal forfeiture provision comparable to that which appears in § 1963.

During at least part of the period covered by the indictment the defendant was having serious tax problems with the Internal Revenue Service. In connection with his tax difficulties the defendant was represented by St. Louis tax attorneys, and he had litigation pending in the Tax Court of the United States.

Very shortly after the indictment in the instant case was returned, the defendant was indicted in the district court on a

number of felony charges of having wilfully failed to collect, account for and pay over to the government federal withholding taxes. 26 U.S.C. § 7202. That case was assigned to District Judge John K. Regan.

The tax case was tried to a jury, and on September 16, 1976 the defendant was found guilty in that case. Four days later the defendant entered his plea of guilty in this case.

On October 22, 1976 the defendant was sentenced in this case by Judge Wangelin to imprisonment for ten years with the stipulation that the sentence run concurrently with the sentence to be imposed by Judge Regan in the tax case, and Judge Regan in that case imposed a sentence of imprisonment for ten years. Execution of both sentences was stayed until January 17, 1977 in order to enable the defendant

to get his affairs in order before going to prison.

Later on the same day, the Internal Revenue Service levied upon and seized assets of the defendant to satisfy his alleged tax liabilities, and efforts of his tax lawyers to obtain a release of the levy were not successful. Plaintiff's claim of breach of plea bargain is based on the fact that his assets were seized by the IRS after his plea of guilty in this case was entered.

When Count 1 of the indictment was dismissed, that automatically eliminated the possibility that defendant would forfeit his business assets under § 1963, and there is no question that dismissal of Count 1 was part of the plea bargain.

The defendant, however, has assumed and now maintains the position that the plea bargain went further than a mere dismissal of all counts of the indictment except

Count 3, and that it included a promise that in exchange for his plea there would be no seizure of any of his property by any agency of the government, including the Internal Revenue Service.

The defendant in November, 1976 filed a motion in the district court for what amounted to specific performance of his version of the plea bargain. That motion was denied, and defendant appealed; the appeal was docketed here but was voluntarily dismissed by the defendant.

The motion with which we are concerned was filed on December 22, 1976. This was during the stay period allowed by Judges Wangelin and Regan, and when the motion was filed defendant was at large on bail.

On January 12, 1977 Judge Wangelin entered his order denying the motion, and on January 14, 1977 notice of appeal was filed.[6]

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[6]The defendant has also appealed from his

Defendant has been permitted to remain free during the pendency of the appeal.[7]

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conviction in the tax case. That appeal has been docketed as No. 76-1957, and we are advised that it is not ready for submission.

[7] After the IRS seized the defendant's property, he employed other counsel who filed the post-sentence motions in the district court and who are representing defendant in connection with this appeal. On January 17, 1977, which was the day on which the stay period expired, counsel presented to a member of this court a motion under Fed. R. App. P. 9 (b) for a further stay and for an order allowing defendant to remain on bail while the appeal was pending. The defendant was allowed to remain at liberty until such time as the matter could be considered by the entire administrative panel of the court. The panel entertained doubt as to whether Appellate Rule 9 (b) is applicable to an appeal from an order denying a motion filed under Criminal Procedure Rule 32(d). However, since the defendant has never commenced serving either of the sentences imposed on him, the panel decided not to take any formal action on the Rule 9 (b) motion but simply to expedite consideration of the appeal on the merits, which has been done. As far as we know, the defendant is still at liberty.

Before discussing the question of whether the district court complied with those portions of Rule 11 which relate to bargained pleas, we deem it well to say that defendant does not contend that any representative of the government ever made him the promise that he postulates; as a matter of fact, he did not participate in the plea bargaining between his then lawyer, Mr. London, and government counsel, Mr. Billeaud. In his affidavit filed in support of the motion defendant stated in substance that Mr. London had told him that it was part of the bargain that his property would not be seized by "the government," that he did not believe that "the government" could or would seize his property, and that he pleaded guilty solely because he thought that by doing so he could save his business for his family, and that he would not have entered his plea if he had known or thought

that his property would be seized.

In a counter affidavit Mr. Billeaud stated that he had no authority to control any action that the IRS might take in its collection process, and that he never represented to Mr. London or to anyone else that he could control the IRS or that he would undertake to do so or influence its actions.

Rule 11 (d) requires a district court to ascertain that a proffered plea of guilty is voluntary before accepting the plea, and the last sentence of that subdivision of the rule is as follows: "The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney."

Rule 11 (e) deals explicitly with "Plea Agreement Procedure," and we set out

the first five subdivisions of it in full:

(e) Plea Agreement Procedure.

(1) In General. The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

(2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. Thereupon the court may accept or reject the agreement, or may defer its decision

as to the acceptance or rejection until there has been an opportunity to consider the presentence report.

(3) Acceptance of a Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) Time of Plea Agreement Procedure. Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

. . . .

Rule 11 (e) was designed to recognize the legal validity of bargained pleas, to regulate the plea bargaining process, and

to eliminate at least some of the problems that have arisen and some of the abuses that have occurred in connection with the process. One of its purposes is to eliminate just the kind of post-conviction dispute that this case exemplifies. It is a salutary rule, and district courts are required to act in substantial compliance with it although, as in the case of other subdivisions of Rule 11, ritualistic compliance is not required.

The transcript of the proceedings that took place on September 20, 1976 is not long, and we reproduce it in full as an Appendix to this opinion.

From a consideration of the transcript it is evident, first, that the district court did not inquire whether the defendant's willingness to plead guilty resulted from plea bargaining negotiations; such an inquiry was required by the last sentence of Rule 11(d).

More important, however, was the failure of the district court to develop fully not only the existence of the plea bargain but also the terms of the bargain. Such developing is particularly important where, as here, the defendant has not participated in the bargaining process and in determining whether to enter a plea of guilty has relied on what his attorney has told him about the terms of the bargain. In such circumstances full disclosure of the results of the negotiations between counsel protects the defendant from the consequences of an improvident plea, and also protects counsel on both sides from later charges of falsehood, bad faith, incompetence, or unprofessional conduct.

If the procedure required by the rule had been followed in defendant's case, and if he had thereafter pleaded guilty, the controversy about the terms of the plea

bargain might never have arisen. And in any event the defendant would have been in a poor position to contend in a post-conviction proceeding that the agreement contained terms that were not disclosed in open court.

It is unfortunate that the district court did not comply more fully than it did with Rule 11 (d) and (e). It is settled in this circuit, however, that not every failure of a district court to comply with the Rule entails the setting aside of a conviction with leave to withdraw a plea of guilty. See United States v. Lambros, 544 F. 2d 962 (8th Cir. 1976). Cf. United States v. Ortiz, 545 F.2d 1122 (8th Cir. 1976), and cases cited.

If we were convinced from the record before us that the bargain between Mr. London and Mr. Billeaud had involved nothing but a dismissal of Counts 1,2,4,5,

6 and 7 in exchange for defendant's plea of guilty to Count 3, we would be most reluctant and perhaps unwilling to reverse the district court's action in denying defendant's Rule 32 (d) motion simply because the district court did not ask the specific question required by the last sentence of Rule 11 (d) or because it failed to bring into the record in express terms the fact that defendant was pleading guilty tc Count 3 in consideration of the agreement of the government to dismiss the remaining counts of the indictment.

However, we cannot be so convinced from the record before us. Where a post-sentence motion for relief under Rule 32 (d) presents an issue of fact, an adversary evidentiary hearing may be required to resolve the issue. United States v. Battle, 447 F.2d 950 (5th Cir. 1971); Meyer v. United States, 424 F.2d 1181 (8th Cir.), cert.

denied, 400 U.S 853 (1970); United States v. Mainer, 383 F2d 444 (3d Cir. 1976): 2 WRIGHT, FEDERAL PRACTICE & PROCEDURE, CRIMINAL, § 539, p. 477.

Had an evidentiary hearing been held in this case, the defendant and Mr. Billeaud could both have testified and would have been subject to cross-examination. Moreover, Mr. London could have been called to the stand. No such hearing was held and neither side brought into the record any statement or affidavit of Mr. London. While it may be doubted that the defendant was told or believed that if he would plead guilty to Count 3 his plea would relieve his property not only from forfeiture under §§ 1963 but also from seizure by the Internal Revenue Service, we cannot say positively that he was not so told or that he did not so believe.

Such being the case, we conclude

that the order of the district court must be reversed and the cause remanded with directions to the district court to hold an evidentiary hearing, to determine what the terms of the plea bargain were and whether the bargain was breached, and whether manifest injustice will result if the conviction based on the guilty plea is permitted to stand.

The question of whether the defendant should be allowed to remain on bail while the case is pending on remand is one that we remit to the discretion of the district court.

Reversed and remanded for further proceedings not inconsistent with this opinion.

A true Copy.

Attest;

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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. . CAPTION . .

ORDER DENYING PETITION FOR REHEARING AND HEARING EN BANC

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

April 19, 1977

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(PART G, 1)

. . CAPTION . .

MANDATE OF THE APPELLATE COURT

This cause came on to be considered on the original files of the United States District Court for the Eastern District of Missouri and briefs of the respective parties without oral argument.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment and sentence of the said District Court in this cause be and the same is hereby reversed.

And it is further ordered by this Court that this cause be and is hereby remanded to the said District Court for proceedings consistent with the opinion of this Court filed this day herein.

March 30, 1977

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(PART H, 1)

. . CAPTION . .

ORDER OF APPELLATE COURT DENYING

STAY OF MANDATE

On consideration of appellant's motion for stay of issuance of mandate in this cause, it is now here ordered by this Court that appellant's motion for stay of issuance of mandate is denied.

May 2, 1977

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RULE 11

FEDERAL RULES OF CRIMINAL PROCEDURE

PLEAS

(a) Alternatives. A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(b) Nolo Contendere. A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands,

the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and

(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

(4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.

(d) Insuring That the Plea is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result

of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney.

(e) Plea Agreement Procedure.

(1) In General. The attorney for the govnerment and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of

other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

(2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. Thereupon the court may

accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report.

(3) Acceptance of a Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court, or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the

opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) Time of Plea Agreement Procedure. Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) Inadmissability of Pleas, Offers of Pleas, and Related Statements. Except as otherwise provided in this paragraph, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other

crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissable in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissable in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

(f) Determining Accuracy of Plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that

there is a factual basis for the plea.

(g) Record of Proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea. Amended Feb. 28, 1966, eff. July 1, 1966; April 22, 1974; July 31, 1975, Pub.L. 94-64 § 3(5)-(10), 89 Stat, 371, 372.

RULE 32

FEDERAL RULES OF CRIMINAL PROCEDURE

(d) Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

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. . CAPTION . .

AFFIDAVIT OF RAYMOND L. SCHARF IN SUPPORT OF MOTION

STATE OF MISSOURI)
SS
COUNTY OF ST. LOUIS)

RAYMOND L. SCHARF, being first duly sworn on oath, deposes and says as follows:

1. That he is the defendant in the above captioned matter.

2. That this affidavit is made in support of the Motion to Set Aside Judgment and Vacate Plea affixed hereto.

3. That he was informed prior to September 20, 1976 by his attorney, Norman S. London, as follows:

a. That a plea bargain had been reached with the government by virtue of which your affiant would be allowed to plead guilty to one count of extortion, and that the other counts would be dismissed.

b. That the government would, as a result of the plea bargain, release the defendant's business.

c. That the government was well aware that the salvage of the business was essential to the plea bargain because of defendant's concern for his family's economic well-being.

4. That as a result of that proposal, he pled guilty on the 20th day of September, 1976.

5. That he understood that the government would thereby allow the business to operate.

6, That he was sentenced on October 22, 1976 in this Court on the charge above captioned.

7. That the government of the United States, through its Internal Revenue Service, seized his business on October 22, 1976,

and held it for one day.

8. That the course of the government's conduct is accurately set forth in the letter of November 4, 1976 over signature of attorney Steven J. Stogel and appended hereto as Exhibit A.

9. That since that time, the government has again seized the business from November 24, 1976 until present.

10. That your affiant has been attempting to negotiate the release of said business, and has made full compliance with the government's requests, but the government yet refuses to release the business.

11. That the government has threatened more seizures of the business following this one over 1973 and 1974 tax liabilities of an unspecified amount.

12. That on or about November 28, 1976, your affiant was informed by Government

Treasury Agent Lewis that IRS personnel were not allowed to talk to defendant by orders from the Crime Task Force, prior to November 24, 1976.

13. That present also at the time of said conversation with Agent Lewis was Henry Purk, a government agent from IRS.

14. That since the date of sentencing in this matter, not one day has passed that affiant's business has not been under seizure or threat of seizure.

15. That had your affiant known the government could or would threaten the existance of his business in this fashion, he would not have pled guilty in this matter.

/s/ Raymond L. Scharf

Subscribed and sworn to before me
this 22nd day of December, 1976.

/s/ John D. Buechner
Notary Public
My Commission 6/2/80

Mr. Norman London, Esq.
London & Greenberg
418 Olive
St. Louis, Missouri 53101

Dear Norman:

Pursuant to the request of Mr. Raymond Scharf, President of the Ray Scharf Coin Machines, Inc. ("Corporation"), I am writing to advise you of the status of the present efforts by the Internal Revenue Service ("IRS") to collect corporate excise taxes alleged to be owed for each calendar quarter of 1972.

On October 22, 1976 at approximately 1:00 p.m., I received a phone call from Mr. Scharf stating that the IRS had served a levy § 6331 (a), for failure to pay excise taxes for withholding and social security, with interest and a fifty percent (50%) penalty added to the excise tax owed. The total amount alleged to be owed was approximately $78,000.00.

As you know, the levy and seizure power of Section 6331 permits the IRS to seize all cash, assets and inventory of the corporation to satisfy the tax obligation alleged to be owed; this power is analogous to a jeopardy assessment. Mr. Daryl Deeker, the IRS Collection Officer, stated that the IRS had sent one prior Notice of Assessment on April 14,1976 to the corporationf although Mr. Scharf denied having received same; however, it is important to note that the levy and seizure power of Section 6331 (a) can be exercised by the IRS without any <u>prior</u> notice to the

Director's prior determination and treatment of the alleged unreported corporate "income" as a distribution of corporate earnings and nondeductible dividend income, on which no withholding or social security would be due.

At my meeting with Mr. Gerardy, I strenuously argued the unfairness of the complete inconsistentcy and mutually exclusiveness of the IRS's position, as well as the probable certainty that if the corporation were "locked up", even for a short time, that it would go out of business. After a long discussion with Mr. Gerardy, he and I agreed, in front of Mr. Scharf and Mr. Jones, to release the tax lien, levy and seizure and Mr. Scharf would immediately pay by casher's check to the IRS approximately $20,000.00 and the remaining cash and checking account balance of approximately $15,000.00 would be used to pay off the creditors and suppliers owed money on October 22, 1976. With this agreement, I left to return to my office and Mr. Scharf left to meet Mr. Deeker at the bank; however, upon returning to the office, at about 4:00 p.m., Mr. Scharf called to tell me that the IRS had "changed its mind" and was requiring all the cash, approximately $35,000.00, as its price to release the lien, levy and seizure. At this point, of course, there was no choice but to pay that amount, in order to keep the business going. It should be noted that the $35,000.00 now retained by the IRS should more than cover any excise taxes which may be owed <u>if</u> the original determination of the District Director as alleged in the Corporation's Notice of Deficiency is finally determined to be correct.

taxpayer and Mr. Deeker indicated that, even if no prior notice had been sent, he could act pursuant to that power.

Upon speaking with Mr. Deeker and Mr. Scharf and a quick review of the files, I knew that immediate action would have to be taken to prevent the corporation from being "locked up". I, along with an associate, David L.Jones, Esq., went downtown to meet with Mr. Deeker's superior, Mr. Gerardy. Mr. Deeker agreed to await the outcome of my meeting with Mr. Gerardy before proceding with the levy and seizure.

In addition to the above IRS activities, it is necessary to digress to update you on the IRS audits and assessements of both Mr. and Mrs. Scharf for the calendar year 1972 and of the corporation for fiscal year ending January 31, 1973, which encompasses most of calendar year 1972. The correctness of these deficiencies is presently being litigated in the United States Tax Court. A substantial portion of the asserted deficiencies against the corporation arise out of alleged unreported income that the corporation received, which money was then allegedly distributed to Mr. Scharf and other employees. The District Director of the IRS determined in his audit that all the money allegedly received by the corporation was all taxable income to it, and after crediting a deduction to the corporation for the money "paid" to the employees other than Mr. Scharf, assessed a deficiency against the corporation. In other words, assuming the corporation has unreported income, the money received by the employees besides Mr. Scharf

were deductible wages and the money received by Mr. Scharf was treated as a dividend for which the corporation was not entitled to a deduction. Then, in assessing a deficiency on Mr. and Mrs. Scharf personally, the District Director determined that Mr. Scharf had received an unreported dividend from his corporation, and increased the income taxes owed accordingly. The Commissioner issued his determination on or about April 15, 1976.

Based on information supplied to me on October 22, 1976 by Mr. Deeker, and since verified by him, the levy and seizure was apparently based on a calculation of excise taxes for social security and withholding on "wages" paid during calendar year 1972 to all employees of the corporation including Mr. Scharf. (Mr. Deeker, despite my requests to illustrate how the taxes were computed, has been unable to obtain the calculations from the Revenue Officer, who made the calcualtions.) Therefore, assuming the corporation did have unreported income (which is the subject of litigation in the Tax Court), and assuming the corpration's employees, other than Mr. Scharf, received same in the amounts set forth in the corporation's Notice of Deficiency as "wages", then the corporation would have been obligated to pay social security and withholding taxes. However, the amount of excise taxes, penalty and interest involved in the levy and seizure was apparently calculated on the basis that the alleged unreported corporate "income" was in fact received by Mr. Scharf as "wages". This calculation, therefore, is clearly inconsistent with the District

Since October 22, 1976, I have talked to and met with Mr. Deeker concerning, (i) the possibility of an advance agreement to litigate the legitimacy of any other assessments of corporate excise taxes, and (ii) the deferral of payments on the assessed corporate excise taxes for 1972, and (iii) the relevancy of the statement and "promise" made to Mr. Scharf by the Strike Force that the Government would leave his business alone if he plead guilty to a pending criminal case. Mr. Deeker, who I believe diligently and in good faith pursued these possibilities, has recently reported to me as follows: (i) that the Government's promise by Mr. Beale of the Strike Force was limited to the RICO statute; (ii) that no agreement to litigate was possible as to any future assessments which might be made, (iii) that the IRS had a right to treat the personal income, corporate income and corporate excise tax matters independent of one another at this time, and (iv) that we agreed to meet on Monday, November 8, 1976, to try to arrange a deferred payment of the corporation's excise tax obligation. At this juncture, there unfortunately exists no available options in the tax law to eliminate or remedy (as well as for Mr. Scharf personally) where the IRS has proceeded to collect money on a theory which is mutually inconsistent with and exclusive from a prior determination that IRS has itself made.

Finally, as I noted earlier, I had not yet received a verification of how the calculations of the corporate excise tax assessments were made and I have a belief, but have not yet been able to verify, that

the same Revenue Officer who initiated the income tax deficiencies against Mr. Scharf and the corporation also initiated the corporate excise tax assessment.

I hope this letter adequately updates you, and if you have any questions, please do not hesitate to call me.

Very truly yours,

/s/ Steven J. Stogel

SJS/jw

AFFIDAVIT OF PROSECUTOR IN OPPOSITION TO MOTION

I, Richard D. Billeaud, Special Attorney, United States Department of Justice, being duly deposed, state the following:

Raymond L. Scharf was indicted on May 27, 1976. That indictment charged him in Count I with violation of Section 1961, 1962(c) and 1963, which is referred to as the RICO statute. Counts II and III charged him with extortion and extortion conspiracy under 1951, Title 18, United States Code. The remaining four counts charged various other violations. The RICO violation contains a provision whereby if the defendant is convicted under the statute, the business which he operated and which is alleged to be operated through a pattern of racketeer-

ing activities is subject to total forfeiture to the United States. On the date of the return of the indictment, this Court signed an Order restraining Mr. Scharf from disposing of any of the assets of the corporation which was named in the RICO count. Your affiant represented the United States in that case.

On September 20, 1976, Mr. Scharf pled guilty to Count III of the Indictment which charged him with extortion conspiracy in violation of Section 1951 of Title 18, United States Code. Mr. Scharf's attorney of record in this case was Mr. Norman London. The Government agreed to recommend dismissal of the RICO count (Count I) and all other counts.

On June 18, 1976, Raymond L. Scharf was indicted in 76-166 Cr. (2) for

seven violations of Sections 7202, Title 26, United States Code (Tax violations). Mr. Scharf was represented in that case by Mr. Merle Silverstein. On September 16, 1976, Mr. Scharf was convicted of all counts of that indictment. Again, your affiant represented the United States.

Between the dates of May 27, 1976 and September 20, 1976, Mr. London and myself had several meetings and discussions concerning the possible disposition of the case by a plea of guilty to one or more counts. Mr. London consistently expressed the inability to plead his client guilty to Count I, which was the RICO count, his primary concern being the length of the sentence imposed under that statute (20 years) and the potential outright forfeiture of the business to

the United States. I initially advised Mr. London that any final decision regarding a plea recommendation would have to be made by my superiors but that I would not even consider requesting of my superiors that they approve a plea recommendation to anything less than a Hobbs Act count (18 U.S.C. 1951), which had an imprisonment potential of twenty years and a fine of not more than $10,000. That was initially unacceptable to Mr. London. On September 17, 1976, the day after Mr. Scharf's conviction in the tax case, I met with Mr. London in the lobby of the Courthouse. We again discussed the possibility of disposing of the case by a plea. Mr. London discussed the possibility of a plea to a count with less than the twenty year imprisonment potential whereupon I advised him that I knew that I could not

get authority for anything less than that and that I was not even certain that I could get authority for that since the Justice Department might wish to hold out for a plea to the RICO count. Mr. London's response to that was that he could not plead his client to that count because of the forfeiture provisions and that he and his client wished to preserve the business so that his family could operate it after he went to jail. I told Mr. London that I wasn't certain how important that consideration should be since it was my understanding that Mr. Scharf had some serious civil tax problems over which I had no control and that as a result, he may have a problem preserving his business anyhow. Mr. London's repsonse to that was words to the effect that the tax case was being handled by Mr. Silverstein and Mr.

Rosenblum (Mr. Silverstein's law partner) and that that was their concern.

At no time either actually, implicitly or otherwise did I ever suggest to Mr. London that I had any authority and could any way affect the outcome of the civil tax case against Mr. Scharf or that I could in any way retard the civil tax collection process. The only discussions ever had between myself and Mr. London related solely to the seven counts in the indictment herein. Prior to Mr. Scharf's conviction in the criminal tax case, we also discussed the possibility of one count plea to that indictment in conjunction with the plea in the instant case. That did not materialize.

Based on the above, it is my opinion that Mr. London and Mr. Scharf were well aware of Mr. Scharf's civil tax problems.

Furthermore, prior to the return of either of the indictments mentioned above, civil tax notices had been filed against Mr. Scharf and Mr. Scharf, through his attorneys, Mr. Silverstein and Mr. Rosenblum, was litigating that in the United States Tax Court. I reiterate that at no time had there been any discussions between myself and Mr. London or between myself and any of Mr. Scharf's attorneys concerning a disposition of the civil tax case, not did I ever suggest or have any discussions relative to any alteration of the civil collection action. At no time was I aware of any specific action to be taken by the Internal Revenue Service relative to civil collection other than the general knowledge that the normal collection process would ensue.

SUBSCRIPTION BY PROSECUTOR. .

Supreme Court, U. S.
FILED
JUL 1 1977
MICHAEL RODAK, JR., CLERK

No. 76-1611

In the Supreme Court of the United States

OCTOBER TERM, 1977

RAYMOND L. SCHARF, PETITIONER
v.
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, Jr.,
Solicitor General,
BENJAMIN R. CIVILETTI,
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Washington, D.C. 20530.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 30-53) is reported at 551 F. 2d 1124.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 1977. A petition for rehearing was denied on April 19, 1977. The petition for a writ of certiorari was filed on May 17, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a collateral attack on his conviction, petitioner was automatically entitled to withdraw his

guilty plea because the district court failed to inquire into the existence and terms of a plea bargain before accepting the plea.

STATEMENT

On September 20, 1976, petitioner entered a guilty plea in the United States District Court for the Eastern District of Missouri to one count of conspiracy to use extortionate means to obstruct interstate commerce, in violation of 18 U.S.C. 1951. Petitioner's plea was entered pursuant to a bargain whereby the government agreed to dismiss six related substantive counts, including a charge of engaging in racketeering activities (in violation of 18 U.S.C. 1962) which, in addition to fine and imprisonment, provided for forfeiture of a convicted defendant's business property acquired or maintained through such illegal conduct. See 18 U.S.C. 1963(a). On October 22, 1976, petitioner was sentenced to ten years' imprisonment (Pet. App. 30, 32, 36–37).

Four days prior to his guilty plea, petitioner was also found guilty after a jury trial of willfully failing to collect, account for, and pay over to the government federal withholding taxes, in violation of 26 U.S.C. 7202. On the day of petitioner's sentencing on the Hobbs Act conviction, the Internal Revenue Service levied upon and seized petitioner's assets to satisfy his tax liability (Pet. App. 40–41). Two months later, on December 22, 1976, petitioner filed a "motion to set aside judgment and vacate plea" (Pet. App. 22–27), alleging, *inter alia,* that the I.R.S. seizure of his property to satisfy the tax levy violated the terms of the

plea bargain and that, in accepting his guilty plea, the district court had failed to comply fully with the requirements of Rule 11 of the Federal Rules of Criminal Procedure because it had not inquired into the existence and terms of the plea bargain (Pet. App. 26, 67–70).

Without conducting a hearing, the district court denied petitioner's motion to withdraw his guilty plea, finding that the plea had been intelligently and voluntarily entered and that petitioner had made no showing of "manifest injustice," as required by Rule 32(d), Fed. R. Crim. P. (Pet. App. 28–29). The court of appeals reversed and remanded for an evidentiary hearing. Although it concluded that the district court had violated Rule 11(d) and (e)(2), Fed R. Crim. P., by not determining whether petitioner's plea was the result of an agreement with the government and, if so, requiring disclosure of the specific terms of the agreement, the court below held that this procedural defect did not necessarily require petitioner's conviction to be set aside and that a reversal would be warranted only if the government had in fact breached the plea bargain (Pet. App. 50–51). Since it was unclear from the record whether petitioner's plea had been prompted solely by the government's promise to dismiss the other counts of the indictment or whether it had also been based upon petitioner's belief that his property would be exempt from seizure, either under the forfeiture provisions of 18 U.S.C. 1963 or pursuant to a tax levy, the court of appeals remanded to the district court "to hold an evidentiary hearing[]

to determine what the terms of the plea bargain were and whether the bargain was breached, and whether manifest injustice will result if the conviction based on the guilty plea is permitted to stand" (Pet. App. 53).

ARGUMENT

Relying on this Court's decision in *McCarthy* v. *United States,* 394 U.S. 459, petitioner contends that once the court of appeals found that various procedural requirements of Rule 11 had not been satisfied, it was required automatically to vacate his conviction. *McCarthy* involved a direct appeal from a conviction entered after a seriously defective guilty plea proceeding in which the district court, in gross disregard of Rule 11, had not even ascertained whether the defendant understood the nature of the charges against him. In reversing the conviction, the Court held that "a defendant whose plea has been accepted in violation of Rule 11 should be afforded the opportunity to plead anew." 394 U.S. at 472.

The "automatic reversal" rule of *McCarthy* was designed in large part to ensure strict compliance with the 1966 version of Rule 11, which worked major, beneficial changes in the plea-taking process in the federal courts by requiring personal interrogation of the defendant, on the record, about the voluntariness of and factual basis for his guilty plea. We believe it to be a question of considerable importance whether the result that *McCarthy* found to be appropriate to enforce the 1966 version of Rule 11 should continue to be applied to pleas taken in

technical violation of the amended Rule 11, effective December 1, 1975, which substantially expands the procedural requirements that a district court must follow prior to accepting a plea to include numerous elements having no substantial effect upon the plea's voluntariness.[1] There is no need to resolve this important question here, however, because, regardless of the continuing applicability of *McCarthy* to technical violations of Rule 11 that are raised on direct appeal or in a timely motion to withdraw the guilty plea, petitioner is not entitled to collateral relief from his conviction.[2]

As the Court recently noted in *Davis* v. *United States,* 417 U.S. 333, 346, quoting from *Hill* v. *United States,* 368 U.S. 424, 428–429, " 'collateral relief is not available when all that is shown is a failure to

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[1] See, *e.g., United States* v. *Journet,* 544 F. 2d 633, 636–637 (C.A. 2) (failure to advise defendant, *inter alia,* that "if he should decide to plead guilty the court would have the right to ask him questions under oath about the offense, in which event, if he should give untrue answers, his statements under oath could be used against him in a prosecution for perjury"); *United States* v. *Boone,* 543 F. 2d 1090 (C.A. 4) (same).

[2] Although petitioner's "motion to set aside judgment and vacate plea" apparently was brought under Rule 32(d), Fed. R. Crim. P., motions made under Rule 32(d) and those under 28 U.S.C. 2255 "largely overlap." 5 Orfield, *Criminal Procedure under the Federal Rules* 236 (1967). See *United States* v. *Watson,* 548 F. 2d 1058 (C.A.D.C.). Here, petitioner's Rule 32(d) motion was filed two months after sentencing and thus well after the time in which to appeal his conviction had expired. See Rule 4(b), Fed. R. App. P. It therefore should properly be regarded as a collateral attack on the conviction. See *Andrews* v. *United States,* 373 U.S. 334, 338 (in post-conviction proceeding, " 'adjudication upon the underlying merits of claims is not hampered by reliance upon the titles petitioners put upon their documents' "); *Hill* v. *United States,* 368 U.S. 424, 430.

comply with the formal requirements' of a rule of criminal procedure in the absence of any indication that the defendant was prejudiced by the asserted technical error." Absent a mistake of constitutional or jurisdictional dimensions, "the appropriate inquiry [is] whether the claimed error of law was 'a fundamental defect which inherently results in a complete miscarriage of justice' * * *" (*ibid.*). See also *Stone* v. *Powell*, 428 U.S. 465, 477, n. 10; *Del Vecchio* v. *United States*, C.A. 2, No. 76-2165, decided May 24, 1977; *United States* v. *Hamilton*, 553 F. 2d 63 (C.A. 10), pending on petition for a writ of certiorari, No. 76-1818; *Johnson* v. *United States*, 542 F. 2d 941 (C.A. 5), certiorari denied, No. 76-5893, March 21, 1977; *McRae* v. *United States*, 540 F. 2d 943 (C.A. 8); *Bell* v. *United States*, 521 F. 2d 713 (C.A. 4), certiorari denied, 424 U.S. 918; *Bachner* v. *United States*, 517 F. 2d 589 (C.A. 7). Accordingly, the court of appeals correctly refused to vacate petitioner's conviction merely because Rule 11 may have been violated and instead remanded for an evidentiary hearing to determine whether petitioner had been prejudiced by the defect. See *United States* v. *Kattou*, 548 F. 2d 760 (C.A. 8).

Although, as petitioner notes (Pet. 14–15), several circuits have relied upon *McCarthy* to grant Section 2255 relief to defendants whose guilty plea was accepted in technical noncompliance with Rule 11 (see *United States* v. *Harris*, 534 F. 2d 141 (C.A. 9); *United States* v. *Yazbeck*, 524 F. 2d 641 (C.A. 1);

United States v. *Wolak*, 510 F. 2d 164 (C.A. 6); *Roberts* v. *United States*, 491 F. 2d 1236 (C.A. 3)), none of these courts analyzed the defendant's claim in terms of the crucial distinction between direct and collateral attacks upon a conviction. The conflict among the circuits may reasonably be expected to disappear as this issue continues to be litigated in the lower courts in light of the proper standard for granting collateral relief outlined in *Davis*. Indeed, within the past year two courts of appeals have reconsidered their previous rulings and have adopted the view we advocate. Compare *Del Vecchio* v. *United States*, *supra*, with *Ferguson* v. *United States*, 513 F. 2d 1011 (C.A. 2), and *McRae* v. *United States*, *supra*, with *United States* v. *Richardson*, 483 F. 2d 516 (C.A. 8).[3]

Finally, whatever the merit of petitioner's contentions in other contexts, there is no necessity for further review at this time. The court of appeals did not hold that petitioner was not entitled to withdraw his plea, but rather that further proceedings in the district court were necessary to elicit the relevant facts. The record when fully developed on remand may show that petitioner was prejudiced by the district court's failure to ascertain the precise details of the plea bargain prior to accepting petitioner's guilty plea and that petitioner is therefore entitled to withdraw his plea.

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[3] The issue is now pending in the Sixth Circuit, *Timmreck* v. *United States*, 423 F. Supp. 537 (E.D. Mich.), notice of appeal filed December 28, 1976.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

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ROBERT J. ERICKSON,
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JULY 1977.

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